# The Dutch Judge of Instruction and the Public Prosecutor in International Judicial Cooperation

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**Article**

## ABSTRACT

The article analyses how national and international developments have reshaped the roles of the Dutch judge of instruction and the public prosecutor in international judicial cooperation. Traditionally, the judge of instruction controlled preliminary investigations and the use of coercive measures, also in cross-border cases. With the abolition of the preliminary investigation and the expansion of prosecutorial powers, the public prosecutor has become the central authority, particularly in extradition matters, the European Arrest Warrant, and the European Evidence Warrant. The author further discusses the implications of the EPPO initiative, highlighting the risks of political influence over ancillary competence and suggesting that the European Public Prosecutor's Office should have full competence for offences linked to the protection of the EU's financial interests.

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# I. Introduction

Historically, pre-trial investigations in Dutch criminal cases are largely based upon the cornerstones of French criminal law. Therefore, the basic structure of these investigations is inquisitor-based. As a consequence, the accused is a subject under investigation by the police and the public prosecutor. If necessary, the common methods of investigation could be enlarged by means of a preliminary investigation. This investigation could be installed after and/or during police investigations upon the request of a public prosecutor. The purpose of this request was to involve the judge of instruction in the investigation and herewith widen the scope of the investigation competences, e.g., for a house search as well as more possibilities for the seizure of goods and the interrogation of the accused and witnesses. These competences could only be exercised with the consent of the judge of instruction in order to ensure that they would not be used without good cause and with respect for the legal interests of the accused. Granting of the request of the public prosecutor meant that control over the preliminary investigation and the exercise of investigative competences would shift from the public prosecutor to the judge of instruction. In addition, requests of the defense concerning the use of investigative competences had to be addressed to the judge of instruction. This shift in supervision to the judge of instruction was common in national cases as well as in cases with an international dimension in which Dutch authorities were involved in the investigation. In cases of an incoming request for international judicial cooperation, the basic procedure was that the public prosecutor receiving the request would hand it over to the judge of instruction, especially in cases where the request involved the exercise of coercive means. The handing over of this request would then, in general, have the same legal consequences as a request for the initiation of a preliminary investigation.[1] To guard against involving the requested authorities without good cause and with respect for the legal interests of the person referred to in the request, the control over these incoming requests for international judicial cooperation shifted from the public prosecutor to the judge of instruction. The consent of the judge of instruction was also required as regards certain requests for international judicial cooperation on behalf of the Netherlands. If the request involved, for example, a house search for the seizure of goods, the public prosecutor was obliged to submit a request for a preliminary investigation with the judge of instruction.[2] Since the turn of the century, the leading role of the judge of instruction has changed and, in turn, the role of the public prosecutor. In this contribution, I will focus on these changing roles, especially when they involve international judicial cooperation.[3] Beside national developments, international developments have also contributed to these changing roles, as can be illustrated in the field of extradition and by the introduction of the European Evidence Warrant and the initiative for the establishment of the European Public Prosecutor's Office.

# II. The New Role of the Judge of Instruction

The central role of the Dutch judge of instruction in both national cases and international judicial cooperation was linked to the existence of the preliminary investigation. This type of investigation has gradually become less important for two reasons. First, the scope of the preliminary investigation was redefined by the Law on the revision of the preliminary investigation.[4] This law reduced the number of cases in which a request for the installment for a preliminary investigation was required. Second, the development of new methods of inquiry in practice led to the introduction of the Law on special methods of inquiry.[5] As a result of this law, the public prosecutor obtained a considerable set of new far-reaching competences, e.g., the systematic observation of persons, infiltration, pseudo-sale, and the inspection of private premises. The decision to use these new competences was attributed to the public prosecutor and decreased the need for him to request a preliminary investigation. Furthermore, the law provided for the wiretapping of and research on confidential communication. This can only be undertaken on order of the public prosecutor with the consent of the judge

of instruction. Written consent is required, but it can be given independent of a preliminary investigation. Hence, these new introduced competences could be used without the need (request) for a preliminary investigation. The next step in this development was a debate on the actual significance of the preliminary investigation. At the beginning of this year, the Dutch legislator took a firm position in this debate with the introduction of the Law on the strengthening of the position of the judge of instruction.[6] In this law, a fundamental change in the structure of the pre-trial investigation in the Netherlands is recognized. This used to be an investigation led by the judge of instruction, but the legislator (also) recognizes that the public prosecutor has increasingly taken over control of pre-trial investigations. And this development is explicitly accepted in the Law on the strengthening of the position of the judge of instruction.[7] As a consequence, the preliminary investigation as such has been abolished. According to this law, the public prosecutor is the central body during pre-trail investigations. He is the first to decide which acts of inquiry and which competences should be used. The judge of instruction is given the role of supervisor during these inquiries. Upon request of the public prosecutor and/or the defense, he can have certain actions of inquiry carried out. In extraordinary cases where there is a concern for irregularity, incompleteness, or lack of expediency, the judge of instruction can still interfere in the pre-trial investigation by inviting the public prosecutor and the defense to a "management" meeting.[8] Nevertheless, his position during pre-trial investigations has, without a doubt, changed from being the central leader and coordinator of these investigations to being a back-office supervisor who usually only intervenes upon request of the public prosecutor or the defense.

# III. The Judge of Instruction in International Judicial Cooperation

The Dutch judge of instruction played a central role not only in national cases but also in international judicial cooperation. In cases of an incoming request for international judicial cooperation, the request was usually dealt with by the receiving Dutch public prosecutor. As a general rule, each request based on a (bilateral) treaty was granted, except in cases where the request led to discrimination, ne bis in idem, or interference with an ongoing Dutch criminal investigation. If the request involved simple actions of inquiry without the use of competences, the public prosecutor could deal with the request himself. However, in cases where the request involved the exercise of competences, the consent of the judge of instruction was required. The public prosecutor was obliged to hand over the request to the judge of instruction if the request would lead to the exercise of competences such as the interrogation of unwilling witnesses, the interrogation of witnesses and experts by a foreign authority by means of videoconference, the generation of an official declaration of a statement or a statement delivered in front of a judge, or the seizure of documentary evidence. This handing over had the same legal consequences as a request for the initiation of a preliminary investigation.[9] With the abolition of the preliminary investigation, this link has vanished. Instead, the handing over of this request has the same legal consequences as a request for certain actions of inquiry. These actions of inquiry include the exercise of competences by the judge of instruction involving the interrogation of the accused, witnesses, and experts, the decision to hand over documentary evidence, the carrying out of a DNA test and, to that end, orders that DNA material be removed, the entry and search of premises, and the seizure of documentary evidence. The seizure of this evidence is only possible if the criminal acts that led to the request for international judicial cooperation could lead to extradition to the requesting state if these same acts were to have been committed in the Netherlands.[10] Beside these actions of inquiry, the public prosecutor can use all other competences deemed appropriate for fulfilling the incoming request for international judicial cooperation. Additionally, the link to the preliminary investigation has also disappeared for the request for international cooperation on behalf of the Netherlands. This means that the public prosecutor can request the exercise of competences in other states if they could be used in the Netherlands. Thus, access to private places in order to seize goods in other states can be requested based on the authority of

the public prosecutor. The judge of instruction only plays a role if the request for international cooperation to other states involves competences that can only be used with his consent. This consent is required when the request to the state concerned involves an immediate house search for the seizure of goods without permission of the resident or a search in the office of a person that has the privilege of nondisclosure.[11]

# IV. The Public Prosecutor and Extradition

In short, in international judicial cooperation the public prosecutor can use all national competences given to him by the Dutch Code of Criminal Procedure (DCPC) and other national criminal laws. The legal provisions concerning extradition are a good example of the delegation of other competences (outside the DCCP) to the public prosecutor. These provisions can be found in the Dutch Law on Extradition (Uitleveringswet).[12] According to the Uitleveringswet, a request for extradition is dealt with by the Dutch Minister of Justice. The request can only be granted if it refers to criminal acts that have been sentenced with a minimum of four months in the requesting state or that have given probable cause for criminal investigation, based on suspicion of criminal acts that may be sentenced with a minimum of twelve months according to the law in the requesting state as well as according to Dutch law (double criminality). The latter situation is relevant since it opens up the possibility of extradition during pre-trial investigations. The request may only be granted for the above-mentioned double criminality and if there are no reasons for denial of the request. Reasons for denial are: an existing death penalty in the requesting state for the criminal acts referred to in the request, discrimination, ne bis in idem, or interference with an ongoing Dutch criminal investigation. As a general rule, each request that meets these standards is granted, which enables the public prosecutor to exercise certain competences. These competences are the apprehension of the requested person and a subsequent detention period of six days maximum as well as the seizure of (his) goods.[13] Since 1 May 2004, the Uitleveringswet is no longer applicable to extradition between Member States of the European Union. Since that date, these extraditions are regulated by the Overleveringswet.[14] This Overleveringswet is the result of the introduction of the Framework Decision on the European Arrest Warrant (EAW).[15] A European Arrest Warrant may only be issued for criminal acts that, in the issuing state, have been sentenced with a minimum of four months or that may be sentenced for a period of twelve months. The latter is relevant since it opens up the possibility of extradition during pre-trial investigations. According to the Overleveringswet, the issued European Arrest Warrant is dealt with by the receiving Dutch public prosecutor. The European Arrest Warrant may only be granted if it involves a criminal act listed in Art. 2 of the Framework Decision EAW that may be sentenced with imprisonment of at least three years, according to the criminal law of the issuing state, or for a criminal act that, according to the law of the issuing state as well as that of the Netherlands, may be sentenced with a period of twelve months. As a general rule, each European Arrest Warrant that meets these standards is granted, which enables the public prosecutor to exercise certain competences. They are linked to the apprehension of the person referred to in the European Arrest Warrant and involve the seizure of (his) goods, the preparation of the interrogation of this person by the officials that issued the European Arrest Warrant, and the temporary disposal of this person to the state that issued this warrant in order to give that person the opportunity to make statements. In addition, the public prosecutor may give his consent to the transit of a person referred to in the European Arrest Warrant on behalf of a third Member State of the European Union.[16] The public prosecutor is also the central body in the reverse situation when a European Arrest Warrant is issued on behalf of the Netherlands. He is entitled to issue a European Arrest Warrant on his own authority and combine it with the following requests: He can request that the apprehension of the person referred to in the European Arrest Warrant involves the seizure of (his) goods, the interrogation of this person in his presence by the competent judicial authorities in the requested state, and the temporary disposal of this person to the Netherlands in order to give that person the opportunity to make statements. He may also request consent to the transit of the person referred to in the European Arrest Warrant to a third Member State of the European Union.[17]

# V. The Public Prosecutor and the European Evidence Warrant

The key provisions concerning extradition make clear that the public prosecutor has become the central body dealing with incoming and outgoing requests for extradition, especially in the European Union. Furthermore, he plays a major role in other means of international judicial cooperation in the European Union. This is exemplified by the recent implementation of the Framework Decision on the European Evidence Warrant for obtaining objects, documents and data for use in criminal matters (EEW).[18] This implementation was transposed into law in 2012.[19] According to this law, the public prosecutor deals with a European Evidence Warrant that is issued by another Member State of the European Union. He is to recognize and implement the European Evidence Warrant within thirty days if it involves the seizure of objects and documents in the Netherlands that contribute to truth finding, obtaining stored and recorded data in the Netherlands or making them accessible to the Netherlands according to Dutch law, and providing for criminal and police information to the issuing state. He will also hand over the aforementioned objects, documents, and data to the issuing state. The implementation of the European Evidence Warrant is denied if its implementation would be contrary to ne bis in idem, if it breaches immunity or privileges for prosecution according to Dutch law, and if the European Evidence Warrant is not issued by a judicial authority in the issuing state in cases in which the implementation of this warrant involves the use of means of coercion. It is also denied if the acts that led to the issuing of the European Evidence Warrant are not punishable in the Netherlands, if implementation of the European Evidence Warrant requires means of coercion, or if the implementation of this warrant requires the use of competences that could not be used if the acts that led to the warrant would have been committed in the Netherlands – unless the warrant refers to criminal acts listed in Art. 14 of the Framework Decision EEW and these acts may be sentenced with imprisonment of at least three years according to the criminal law of the issuing state. Additionally, the implementation of the European Evidence Warrant may be denied if the acts that led to the issuing of this warrant took place within Dutch territory, outside the territory of the issuing state and the Netherlands would not have jurisdiction if these acts were to have been committed outside Dutch territory, if the implementation of the European Evidence Warrant would conflict with national Dutch interests, or if the issued European Evidence Warrant is incomplete or insufficient. The implementation of the European Evidence Warrant may involve the use of national competences attributed to the public prosecutor by Dutch criminal law. If the European Evidence Warrant refers to criminal acts listed in Art. 14 of the Framework Decision EEW and these acts may be sentenced with an imprisonment of at least three years according to the criminal law of the issuing state, the public prosecutor is entitled to the use of his competences even if the national Dutch law does not foresee their use for criminal acts referred to in the European Evidence Warrant. The public prosecutor hands over the European Evidence Warrant to the judge of instruction only if the implementation of this warrant involves competences exclusively attributed to the judge of instruction, e.g., an immediate house search for the seizure of goods without permission of the resident. The handing over of the European Evidence Warrant has the same legal consequences as a request for certain actions of inquiry. After having used his requested competences, the judge of instruction hands over the seized objects, documents, and data to the public prosecutor who sends them to the issuing state. This sending is postponed in case a third party files a complaint against it, and it is rejected if a Dutch Court of Justice agrees with the complaint.[20] In the reverse situation (of a European Evidence Warrant on behalf of the Netherlands), both the public prosecutor and the judge of instruction are authorized to issue a European Evidence Warrant and send it directly to the competent judicial authorities of another Member State of the European Union. This European Evidence Warrant may be issued in order to seize and obtain objects, documents, stored and recorded data, and criminal and police information that contribute to truth finding, that are accessible to another Member State of the European Union, or that are in accordance with the law of another Member State of the European Union.[21]

# VI. The Public Prosecutor and the EPPO Initiative

The implementation of the EEW confirms the changed role of the public prosecutor in international judicial cooperation. He has become the leading body and, in some cases, he needs the consent of the judge of instruction. This leading role of the public prosecutor is of importance in light of the proposal for the establishment of the European Public Prosecutor's Office (EPPO initiative).[22] This initiative is based on Arts. 86 and 325 of the (consolidated) Treaty on the functioning of the European Union that provide the competence for the European Union to counter fraud and other offences affecting its financial interests. The objective of this initiative is to establish a coherent European system for a more efficient and effective investigation and prosecution as well as to enhance the deterrence of offences affecting the financial interests of the European Union. It also ensures close cooperation and the effective information exchange between the European Union and competent authorities of the Member States. Therefore, the initiative sets forward the establishment of a European Public Prosecutor's Office that will be exclusively competent in cases of fraud against the European Union. For such cases, the establishment of the European Public Prosecutor's Office includes the introduction of investigative competences, the right to prosecute, and the right to bring a case before the competent national judge in any Member State of the European Union. Each Member State will appoint one or more delegated public prosecutors who, on behalf of the European Public Prosecutor's Office, will bring these cases before the competent national authorities. Much has been said on the EPPO initiative,[23] but it seems appropriate to say that the general approach in this EPPO initiative fits in well with the development of the role of the Dutch public prosecutor. Both the EPPO initiative and this development strengthen the position of the public prosecutor in international judicial cooperation.

# VII. The Public Prosecutor and Ancillary Competence

Nevertheless, the following issue in the context of the EPPO initiative could be problematic when looking at the position of the delegated (Dutch) public prosecutor. This issue concerns the so-called ancillary competence.[24] This means that the competence of the European Public Prosecutor's Office is enlarged to include serious criminal offences that are linked to offences affecting the financial interests of the European Union and that are based on identical facts. This ancillary competence can give rise to competence claims on the part of both the European Public Prosecutor's Office and national prosecuting authorities. If this is the case, the final decision is in the hands of the national judicial authority competent to decide on the attribution of competences concerning prosecution at the national level. From a Dutch perspective, this can be understood in the sense that the national legislator (Minister of Justice and national parliament) is competent, but it can also be the head of the public prosecuting office. In both interpretations, it is possible that the Minister of Justice (upon request of the Dutch parliament) may interfere with the final decision on ancillary competence, as he is entitled to give general and specific instructions to the public prosecuting office.[25] This opens up the possibility that this final decision can be influenced by political motives. In the Netherlands, these motives are often influenced by sentiments that are nationally oriented and less European-minded. Moreover, the caseload work for the national public prosecuting office is considered to be overwhelming. This promotes the orientation towards allocating the available prosecution resources to national cases instead of cases linked to Europe. It could all end up to the effect that the final decision on ancillary competence is made with too much consideration for national interests. Even if this final decision would lead to prosecution, it could well be imagined that the delegated public prosecutor would be restricted in his prosecution options (by political motives). Would it then not be a better idea to give the European Public Prosecutor's Office full competence for all serious criminal offences that are linked to offences affecting the financial interests of the European Union and that are based on identical facts? This would also avoid the danger of diverging prosecution strategies on the part of the European Public Prosecutor's Office and the delegated public

prosecutor, as it clear that the latter acts exclusively on behalf of the European Public Prosecutor's Office and within its prosecution strategy. A related issue is the position of the delegated public prosecutor towards the police. During police investigations, the Dutch public prosecutor is in charge of these investigations and authorized to give the necessary instructions to the police.[26] But the Dutch Minister of Justice is politically responsible for the use of these instructions and therefore, as mentioned earlier, entitled to give general and specific instructions to the public prosecuting office. This can complicate the role of the delegated public prosecutor in supervising the police investigation of serious criminal offences that are linked to offences affecting the financial interests of the European Union and that are based on identical facts if it is not (yet) clear whether the prosecution decisions will be on behalf of the European Public Prosecutor's Office or on the national level. Would it not be better to give the European Public Prosecutor's Office full competence in police investigations that involve serious criminal offences that are linked to offences affecting the financial interests of the European Union and that are based on identical facts? In his relation to the police, it would then be clear that the delegated public prosecutor acts exclusively on behalf of the European Public Prosecutor's Office and that he is only accountable for his actions to this office and, indirectly, to the European Parliament.

# VIII. Conclusion

National as well as international developments have changed the role of the Dutch judge of instruction and the public prosecutor, especially in international judicial cooperation. The public prosecutor has become the central player in this cooperation, e.g., extradition and the European Evidence Warrant. Also, in the EPPO initiative, an important role is foreseen for the (delegated) public prosecutor. With regard to ancillary competence, it seems appropriate to underline his independence towards national authorities. This can be fostered to grant the European Public Prosecutor's Office full competence in police investigations and the prosecution decisions concerning serious criminal offences that are linked to offences affecting the financial interests of the European Union.

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1. Art. 552o former Dutch Criminal Procedure Code (DCPC).↩
2. (Dutch) High Court 29 September 1987, NJ (Dutch Jurisprudence) 1988, 302.↩
3. International judicial cooperation is understood in the sense that the Netherlands have interpreted this concept since the ratification of the European Convention on Mutual Assistance in Criminal Matters (Strasbourg 20 April, Trb. (Treaty Series) 1965, 10). This kind of assistance includes assistance on behalf of the Dutch public prosecuting office (and excludes any assistance on behalf of a police authority).↩
4. Wet herziening gerechtelijk vooronderzoek (Stb. (Government Gazette) 1999, 243).↩
5. Wet bijzondere opsporingsbevoegdheden (Stb. 1999, 245).↩
6. Wet herijking positie rechter-commissaris of 1 January 2013 (Stb. 2012/408).↩
7. This development also seems to have occurred in Belgium: *Paul de Hert en Tom Decaigny*, Evolueren het Nederlandse en het Belgische strafproces naar adversaire systemen?, Strafblad, Sdu, p. 61.↩
8. Arts. 180, 181, 182 and 185 DCCP.↩
9. Art. 552k, l, n and o former DCCP.↩
10. Art. 552n and o DCCP.↩
11. Art. 96c and 97 DCCP.↩
12. Law of 9 March 1967, Stb. 1967, 139.↩
13. Arts. 8-11, 18 , 40 and 46 Uitleveringswet↩
14. Law of 29 April, Stb. 2004, 195.↩
15. Framework Decision 2002/584/JBZ (PbEG 2002, L 190).↩
16. Arts. 5, 7, 49-54 Overleveringswet.↩
17. Arts. 55-58 Overleveringswet.↩
18. Framework -Decision 2008/978/JBZ (PbEU L 350).↩
19. Law of 13 December 2012 (Stb. 2013, 10).↩
20. Art. 552ww, xx, yy, aaa, ccc and ggg DCCP.↩
21. Art. 552ddd and fff DCCP.↩
22. COM(2013)534.↩

23. See, e.g., *José Luis Lopes de Mota*, Eurojust – The heart of the Future European Public Prosecutor's Office, EUCRIM 1-2/2008, pp. 62-66, *Simone White*, A decentralised European Public Prosecutor's Office, EUCRIM 2/2012, pp. 67-75, and *Valentina Covol*, From Europol to Eurojust – towards a European Public Prosecutor, EUCRIM 2/2012, pp. 83-88.↩
24. Arts. 12 and 13 EPPO initiative.↩
25. Art. 127 Law on the Organization of the Judiciary (Wet op de rechterlijke organisatie).↩
26. Art. 148 DCCP.↩



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